Supreme Court, U.S.
FILED
MAR 1 1995
OFFICE OF THE CLERK

No. 93-2068

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

BRETT C. KIMBERLIN,
Petitioner,
v.
J. MICHAEL QUINLAN, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL AREA, THE AMERICAN JEWISH CONGRESS AND TRIAL LAWYERS FOR PUBLIC JUSTICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI 2

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 4

ARGUMENT 7

IMPOSING HEIGHTENED PROCEDURAL AND EVIDENTIARY BURDENS ON *BIVENS* PLAINTIFFS IS INCONSISTENT WITH THE FEDERAL RULES OF CIVIL PROCEDURE AND THIS COURT'S PRECEDENTS 7

CONCLUSION 22

TABLE OF AUTHORITIES

CASES **Page**

Anderson v. Creighton, 483 U.S. 635 (1987) 14
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 12
Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 11
Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971) 5, 17
Branch v. Tunnell, 937 F.2d 1382 (9th Cir. 1991), *cert. denied*, 114 S. Ct. 2704 (1994) 9, 15
Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 12
Conley v. Gibson, 355 U.S. 41 (1958) 10
Crutcher v. Kentucky, 883 F.2d 502 (6th Cir. 1989) 9
Davis v. Passman, 442 U.S. 228 (1979) 5
Davis v. Scherer, 468 U.S. 183 (1984) 7
Elliott v. Perez, 751 F.2d 1472 (5th Cir. 1985) 10
Elliott v. Thomas, 937 F.2d 338 (7th Cir. 1491) 9, 14, 16
Farmer v. Brennan, 114 S. Ct. 1970 (1994) 11
First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968) 19
Glen Eden Hospital, Inc. v. Blue Cross and Blue Shield of Michigan, Inc., 740 F.2d 423 (6th Cir. 1984) 13
Gomez v. Toledo, 446 U.S. 635 (1980) 11
Harlow v. Fitzgerald, 457 U.S. 800 (1982) .... *passim*
Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984) . 10, 18
Holland v. United States, 348 U.S. 121 (1954) 9

Kimberlin v. Quinlan, 774 F. Supp. 1 (D.D.C. 1991) 4, 21
Kimberlin v. Quinlan, 6 F.3d 789 (D.C. Cir. 1993), *reh'g en banc denied*, 17 F.3d 1525 (D.C. Cir. 1994) 4
Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 113 S. Ct. 1160 (1993) 10, 11
Martin v. D.C. Metropolitan Police Department, 812 F.2d 1425 (D.C. Cir. 1987), *vacated in part*, 817 F.2d 144 (D.C. Cir. 1987), *reinstated sub nom. Bartlett v. Bowen*, 824 F.2d 1240 (D.C. Cir. 1987) 18, 20
Michalic v. Cleveland Tankers, Inc., 364 U.S. 325 (1960) 9
Mitchell v. Forsyth, 472 U.S. 511 (1985) 7, 14
Nixon v. Fitzgerald, 457 U.S. 731 (1982) 2
Pueblo Neighborhood Health Centers v. Losavio, 847 F.2d 642 (10th Cir. 1988) 14
Resolution Trust Corp. v. North Bridge Assocs., 22 F.3d 1208 (1st Cir. 1994) 13
Siegert v. Gilley, 111 S. Ct. 1789 (1991) 14, 17
United States v. Lam Kwong-Wah, 924 F.2d 298 (D.C. Cir. 1991), *cert. denied*, 113 S. Ct. 287 (1992) 9
United States v. National Treasury Employees Union, 63 U.S.L.W. 4133 (U.S. Feb. 22, 1995) 17
Wayte v. United States, 470 U.S. 598 (1985) 11

RULES

Federal Rule of Civil Procedure 8 ..... 10, 14
Federal Rule of Civil Procedure 9 10
Federal Rule of Civil Procedure 56 ..... *passim*

MISCELLANEOUS

10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2741 (1983) 13
6 pt.2 J. Moore, *Moore's Federal Practice* ¶ 56.24 (2d ed. 1993) 13, 20
K. Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 Ga. L. Rev. 597 (1989) 11

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INTEREST OF AMICI[1]

The American Civil Liberties Union ("ACLU") is a nation-wide, nonprofit, nonpartisan organization with nearly 300,000 members that, since its founding in 1920, has been devoted to protecting the constitutional rights of all Americans. Toward that goal, the ACLU has frequently represented individuals in civil actions seeking damages against government officials who have violated their constitutional rights. The American Civil Liberties Union of the National Capital Area is the Washington, D.C., affiliate of the ACLU and has been involved in many cases involving claims against government officials for violations of constitutional rights. The ACLU and its affiliates have been involved in numerous *Bivens* actions before this Court, both as direct counsel and as *amicus curiae*, including *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, political and economic rights of Jews. It has frequently found it necessary to engage in litigation to preserve these rights and not infrequently finds itself in those cases in the position of petitioner -- convinced that a wrong has been perpetrated but needing additional evidence to complete its proof of a violation of law. The rule of law applied here by the D.C. Circuit would deny the American Jewish Congress and those it represents a day in court.

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[1] Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Rule 37.3.

Trial Lawyers for Public Justice ("TLPJ") is a national public interest law firm that marshals the skills and resources of trial lawyers to create a more just society. Through litigation and work with the broader public interest community, TLPJ seeks to challenge governmental, corporate, and individual wrongdoing, guard access to the courts, and combat threats to the civil justice system. TLPJ participates as *amicus curiae* in this case because it believes that imposition of a heightened pleading requirement in *Bivens* actions is contrary to the fundamental right of access to the civil justice system.

STATEMENT OF THE CASE

Four days before the 1988 presidential and vice-presidential election, and hours before federal inmate Brett C. Kimberlin was scheduled to hold a group interview with members of the national media to discuss allegations that he had sold marijuana to candidate Dan Quayle in the early 1970's, the then-Director of the Federal Bureau of Prisons, J. Michael Quinlan, cancelled the interview. Later that day, although Quinlan had never before made decisions about the segregation of individual prisoners, he personally ordered Kimberlin to be placed in administrative detention, where he was unable to communicate with the media. Quinlan's office had consulted with respondent Loye Miller, a senior Justice Department official, to whom the Bush-Quayle campaign had repeatedly complained about Kimberlin's ability to communicate with the press while incarcerated. Prison officials again placed Kimberlin in detention the day

before the national election, and yet again a few weeks later.

Kimberlin filed this *Bivens* action alleging that Quinlan and Miller prevented or punished his exercise of First Amendment rights, and that respondents' conflicting and inconsistent explanations for their actions were pretexts. Respondents moved for summary judgment before Kimberlin took any discovery. The district court denied the motion, and lifted its earlier stay of discovery relating exclusively to the *Bivens* claims, based on its finding that Kimberlin had offered "nonconclusory" and "tangible" factual allegations in support of his claims. *Kimberlin v. Quinlan*, 774 F. Supp. 1, 6 (D.D.C. 1991). On respondents' interlocutory appeal, the Court of Appeals reversed, holding over a vigorous dissent that petitioner failed to meet the Circuit's heightened pleading, or heightened production, standard requiring direct as opposed to circumstantial evidence that respondents had acted with an impermissible motive. *Kimberlin v. Quinlan*, 6 F.3d 789 (D.C. Cir. 1993), *reh'g en banc denied*, 17 F.3d 1525 (D.C. Cir. 1994). This Court granted certiorari on January 20, 1995. 115 S. Ct. 929 (1995).

SUMMARY OF ARGUMENT

This case presents a question of substantial practical importance in *Bivens* actions: in what circumstances may a plaintiff alleging violation of clearly established constitutional rights proceed with at least limited discovery when a defendant government official makes a pre-discovery motion for summary judgment? Rule 56(f) of the Federal

Rules of Civil Procedure defines these circumstances, allowing a plaintiff to proceed with discovery if she offers nonconclusory factual allegations indicating that discovery is likely to produce additional evidence sufficient to support a jury verdict in her favor. As several courts of appeals and Justices of this Court have indicated, this standard, and the district courts' authority over discovery, provide ample protection for blameless officials seeking relief from unjustified discovery burdens. No distortion of the Federal Rules through any heightened pleading requirement is justified. All that is necessary or appropriate is "firm application of the Federal Rules of Civil Procedure" as they are written. *See Harlow v. Fitzgerald*, 457 U.S. 800, 819 n.35 (1982) (quoting *Butz v. Economou*, 438 U.S. 478, 508 (1978)).

The Rule 56(f) standard strikes the appropriate balance between the legitimate interests of *Bivens* plaintiffs and *Bivens* defendants. "An agent acting -- albeit unconstitutionally -- in the name of the United States possesses a far greater capacity for harm than an individual . . . exercising no authority other than his own." *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 392 (1971). Moreover, for individual victims of unconstitutional conduct, "it is damages or nothing," and a right without a remedy is not a right at all. *Id.* at 410.[2] It is therefore

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[2] *See Harlow*, 457 U.S. at 814 ("In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees."); *Davis v. Passman*, 442 U.S. 228, 242 (1979) ("[U]nless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have

(continued...)

essential to preserve an effective constitutional remedy against government officials who violate clearly established constitutional rights. This standard gives *Bivens* plaintiffs, like plaintiffs in other kinds of cases, a reasonable opportunity to conduct appropriate discovery before they are forced to respond to the merits of a summary judgment motion.

At the same time, Rule 56(f) protects government officials from the unjustified burden of defending spurious suits. It prohibits *Bivens* plaintiffs from subjecting officials to extensive discovery based on nothing more than a vague hope that discovery will produce hard evidence, thereby permitting courts to resolve "many insubstantial claims on summary judgment" at the outset of the case. *See Harlow*, 457 U.S. at 818. Furthermore, trial judges have ample discretion within the existing framework of the Federal Rules to weigh any "peculiar[] disrupti[on] of effective government" in deciding how narrow or broad discovery should be. *See id.* at 817.

The standards applicable to *Bivens* actions should be developed consistent with one of the most basic principles on which our Constitution is built: the people need protection from governmental abuses more than the government needs protection from the people. The government poses a far greater threat to individual liberties than the people pose to governmental preroga-

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[2] (...continued)
been violated . . . must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.").

tives. It is the highest duty of the federal courts to safeguard the rights of the people against the government.

ARGUMENT

IMPOSING HEIGHTENED PROCEDURAL AND EVIDENTIARY BURDENS ON *BIVENS* PLAINTIFFS IS INCONSISTENT WITH THE FEDERAL RULES OF CIVIL PROCEDURE AND THIS COURT'S PRECEDENTS

This is not a case about qualified immunity. The standards under which government officials are entitled to qualified immunity from liability or suit were announced in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), which held that qualified immunity depends *exclusively* on the "objective legal reasonableness of an official's conduct as measured by reference to clearly established law." *Id.* at 818. "No other 'circumstances' are relevant to the issue of qualified immunity." *Davis v. Scherer*, 468 U.S. 183, 191 (1984) (citations omitted). In this case, respondents have no qualified immunity defense because the First Amendment right that they allegedly violated was clearly established.[3] *See Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985). Accordingly, this case presents no occasion for the court to consider the standards for qualified immunity or the

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[3] Understandably, respondents make no claim that the First Amendment even arguably leaves them free to prevent prisoners from, or punish prisoners for, communicating to the press on matters of public concern, or to treat different prisoners differently depending on whether prison officials agree with the information the prisoners provide to the press.

purely legal question of whether the constitutional right that respondents allegedly violated was clearly established.

Respondents sought summary judgment on the purely factual issue of whether they had acted with the intent or purpose of preventing petitioner from speaking with the press. What this case involves, then, is whether *Bivens* plaintiffs should be barred from pursuing discovery that would be available in any other case to establish the essential factual elements of their claim.

The answer lies in the Federal Rules of Civil Procedure, which provide a complete and neutral mechanism for resolving motions for summary judgment. As explained below, the existing framework of the Federal Rules gives federal courts ample power to protect federal employees lacking qualified immunity from the burdens of cases brought without any substantial factual basis. The Court need not, and may not, rewrite the Federal Rules to create any extraordinary standard applicable to motions to dismiss or for summary judgment in *Bivens* cases directed to the kinds of factual issues that federal courts routinely adjudicate in a variety of cases.

The Direct Evidence Rule. Instead of applying the Federal Rules as written, the court below held that respondents were entitled to pre-discovery summary judgment because petitioner failed to produce direct, as opposed to circumstantial, evidence of respondents' improper motive. As petitioner and the United States demonstrate in detail, any standard based on the notion that circumstantial evidence has no probative value is wholly unjustified.

Circumstantial evidence is "intrinsically no different from testimonial evidence" and can be "more certain, satisfying and persuasive than direct evidence." *Holland v. United States*, 348 U.S. 121, 140 (1954); *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960). Circumstantial evidence alone can be sufficient to prove guilt beyond a reasonable doubt in a criminal case, *United States v. Lam Kwong-Wah*, 924 F.2d 298, 303 (D.C. Cir. 1991), *cert. denied*, 113 S. Ct. 287 (1992), and equally compelling circumstantial evidence is more than sufficient in a *Bivens* case. Moreover, a direct evidence requirement would effectively bar *Bivens* actions where motive is an element because in only the rarest of cases will the plaintiff have the defendant's confession of a deliberate constitutional violation. *See Elliott v. Thomas*, 937 F.2d 338, 345 (7th Cir. 1991). These reasons explain why circuits other than the District of Columbia Circuit have uniformly rejected a direct evidence requirement. *See, e.g., Branch v. Tunnell*, 937 F.2d 1382, 1386-87 (9th Cir. 1991), *cert. denied*, 114 S. Ct. 2704 (1994); *Elliott*, 937 F.2d at 345; *Crutcher v. Kentucky*, 883 F.2d 502, 504 (6th Cir. 1989).

The "Heightened Pleading" Requirement. An equally illegitimate procedural obstacle would be a special pleading rule that requires extraordinary particularity solely in *Bivens* complaints.[4] *See, e.g., Branch*, 937 F.2d

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[4] Although certiorari was granted on the question whether "plaintiffs in *Bivens* cases in which unlawful motive is an element of the alleged offense must satisfy a 'heightened pleading standard,'" we agree with the Solicitor General's earlier submission that resolution of this question is not essential to the determination of this case because petitioner

(continued...)

at 1386; *Elliott v. Perez*, 751 F.2d 1472, 1482 (5th Cir. 1985); *Hobson v. Wilson*, 737 F.2d 1, 29-31 (D.C. Cir. 1984). Any requirement that the complaint plead unconstitutional motive with particularity simply cannot be squared with the language of the Federal Rules or with this Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993).

Rule 8 of the Federal Rules of Civil Procedure requires that a complaint include only "a short and plain statement of the claim showing that the pleader is entitled to relief." Under the notice pleading rule embodied in Rule 8, plaintiffs are *not* required to set out in detail the facts underlying their claims. *Conley v. Gibson*, 355 U.S. 41, 47 (1958). Rule 9 sets out the sole exceptions to the liberal pleading system, and Rule 9(b) specifically provides that "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally." For the same reasons that the Court interpreted these rules to mean what they say in the context of § 1983 actions against municipalities, a heightened pleading requirement in *Bivens* cases against government officials would be "impossible to square" with the Federal Rules' notice-

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[4] (...continued)
provided greater specificity than would be required in a well-pleaded complaint.

pleading approach. *See Leatherman*, 113 S. Ct. at 1163-64.[5]

Summary Judgment Procedures. The procedural vehicle that most defendants use to obtain early resolution of *Bivens* cases is not a motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted, but rather a motion for summary judgment under Rule 56. *See* K. Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 Ga. L. Rev. 597, 652 & n.220 (1989). Here, consistent with this practice, and before discovery began, respondents sought summary judgment on the "motive" element of petitioner's constitutional claim, that is, the allegation that respondents acted with the intent to punish or prevent his exercise of clearly established First Amendment rights.[6]

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[5] A heightened pleading requirement would be even more inappropriate in the context of qualified immunity. "[Q]ualified immunity is a defense, [and] the burden of pleading it rests with the defendant." *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). The possibility that the defendant will claim immunity does not impose on the plaintiff "an obligation to anticipate such a defense" and plead around it in the complaint. *Id.* If a plaintiff need not plead any facts at all in anticipation of such a defense, surely she cannot be required to plead those facts with special particularity.

[6] An essential element of many constitutional violations involves the intent or motive of the government official. *See, e.g., Farmer v. Brennan*, 114 S. Ct. 1970, 1977 (1994) ("To violate the cruel and unusual punishments clause, a prison official must have a 'sufficiently culpable state of mind.'") (citation omitted); *Wayte v. United States*, 470 U.S. 598 (1985) (selective prosecution claim must be supported by evidence of discriminatory purpose); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) (invidious discriminatory purpose required for claim of racial discrimination under equal protection clause).

What standards, then, should be applied when the defendant in a *Bivens* case moves for summary judgment at the beginning of the lawsuit before the plaintiff has had an opportunity to conduct any discovery? Under the Federal Rules of Civil Procedure, the plaintiff has two procedural options. First, under Rule 56(c), she can offer evidence that creates a genuine dispute about a material fact. The evidence must be sufficient to support a jury verdict in her favor on that issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986) (citation omitted). The trial court's responsibilities in this situation are plain and, *amici* believe, undisputed: if the plaintiff can meet this burden at the initial stages of a case, the trial court must deny the summary judgment motion and allow the plaintiff to conduct appropriate discovery to obtain additional evidence to further strengthen her case.

The plaintiff's other procedural option is to submit a Rule 56(f) affidavit demonstrating why she does not have sufficient facts within her possession *at that stage of the case* to create a genuine dispute about a material fact. Under Rule 56(f), the non-movant may offer an affidavit explaining the reasons why she cannot *at that time* set forth facts essential to justify her opposition. The paradigmatic reason a party would not have such essential facts is that she has not yet been able to take necessary discovery. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) (Rule 56(f) allows a summary judgment motion to be denied "if the non-moving party has not had an opportunity to make full discovery"); *Liberty Lobby, Inc.*, 477 U.S. at 250 n.5 (same). Adjudication of summary judgment motions before discovery is especially likely to be unfair when

knowledge of the relevant facts "is exclusively with or largely under the control of the moving party." 6 pt. 2 J. Moore, *Moore's Federal Practice* ¶ 56.24, at 56-809 (2d ed. 1993) ("*Moore's Federal Practice*"); 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2741, at 545 (1983) ("*Wright, Miller & Kane*"). In these circumstances, the party opposing summary judgment should be given the opportunity to obtain those facts through discovery. *Moore's Federal Practice* ¶ 56.24, at 56-809; *Resolution Trust Corp. v. North Bridge Assocs.*, 22 F.3d 1198, 1208 (1st Cir. 1994); *Glen Eden Hospital, Inc. v. Blue Cross & Blue Shield of Michigan, Inc.*, 740 F.2d 423, 427 (6th Cir. 1984).

A Rule 56(f) affidavit must do more than merely assert in conclusory terms a need for discovery. The plaintiff must present a "plausible basis for a belief that discoverable materials exist" that would be likely to raise a genuine issue of material fact. *North Bridge Assocs.*, 22 F.3d at 1206. Mere speculation or an unexplained "averment of . . . exclusive knowledge or control of the facts" by the moving party will not suffice. *Moore's Federal Practice* ¶ 56.24, at 56-811; *Wright, Miller & Kane* § 2741, at 548. The non-movant must identify specific facts within the movant's control, explain how discovery is likely to lead to those facts, and show that those facts are likely to create a factual question properly resolved at trial. *Moore's Federal Practice* ¶ 56.24, at 548-52.

The standard Rule 56(f) test that is applied in other kinds of cases can and should be applied in *Bivens* actions. As several Justices of this Court and several courts of appeals have stated, a *Bivens* plaintiff should be allowed

to proceed with at least limited discovery if she produces "specific, nonconclusory factual allegations" supporting her case in response to a pre-discovery summary judgment motion. *See Siegert v. Gilley*, 111 S. Ct. 1789, 1795 (1991) (Kennedy, J., concurring in the judgment); *id.* at 1801 (Marshall, J., dissenting); *Elliott v. Thomas*, 937 F.2d 338, 344-45 (7th Cir. 1991); *Pueblo Neighborhood Health Centers v. Losavio*, 847 F.2d 642, 649 (10th Cir. 1988). This Court has itself recognized that plaintiffs should be allowed to conduct discovery "to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts" that violated clearly established law. *Mitchell v. Forsyth*, 457 U.S. 511, 526 (1985); *see also Anderson v. Creighton*, 483 U.S. 635, 646-47 n.6 (1987) (discovery "tailored specifically to the question of . . . qualified immunity" should be permitted).

When a defendant in a *Bivens* case, or any other case, moves for summary judgment before discovery has begun, Rule 56(f) may require the plaintiff to present factual allegations more specific than those sufficient to satisfy the notice-pleading requirement of Rule 8. For example, although a general allegation of unconstitutional intent is sufficient to survive a motion to dismiss, it may not be adequate when the defendant files a summary judgment motion with supporting evidence indicating the absence of any illegitimate motive. Thus, a plaintiff alleging malice would not be able to defeat or delay the defendant's

motion for summary judgment with purely conclusory allegations.[7]

Equally important, however, the Rule 56(f) standard does *not* require the plaintiff to possess at the outset of the case evidence sufficient to support a favorable jury verdict. If she already possesses the facts "essential to her opposition," invocation of Rule 56(f) would be unnecessary, and she could defeat summary judgment outright under Rule 56(c). The requirement that a *Bivens* plaintiff produce specific, nonconclusory factual allegations in response to a pre-discovery summary judgment motion is significantly less demanding than the burden imposed by Rule 56(c). *Tunnell*, 937 F.2d at 1387-88. Put differently, the showing that a plaintiff must make to get discovery is less than the showing necessary to defeat summary judgment and get to trial. Plaintiffs in *Bivens* cases should not face a unique and unfair obligation to be ready for trial even before they file their lawsuit.

To impose a "heightened" Rule 56(f) test in *Bivens* cases would be neither necessary nor appropriate. The standard Rule 56(f) test gives *Bivens* plaintiffs a reasonable opportunity to pursue discovery when they can provide a non-conclusory basis for their allegations that the defendants did in fact violate their clearly established constitutional rights. Moreover, as shown above, the standard

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[7] The same would be true of the wide variety of legal and equitable claims -- *e.g.*, malicious prosecution, abuse of process, fraud, tortious interference with contractual relations -- that require allegation and proof of malice or similar states of mind.

Rule 56(f) test provides ample protection for the legitimate interests of *Bivens* defendants. If the plaintiff cannot provide some non-conclusory support for the general factual allegations in her complaint, summary judgment is properly granted at that point, allowing the defendant to avoid the burdens associated with full scale litigation. *See Elliott*, 937 F.2d at 345 ("Unless the plaintiff has the kernel of a case in hand, the defendant wins on immunity grounds in advance of discovery.").

Government officials have argued that they deserve special protection because the burdens of *Bivens* litigation are simply too great for them to have to bear. Litigation is undeniably a burden, but it is important to put in perspective the weight of the burden that will be borne by federal officials in these cases. The government generally pays all the costs of defense and provides free legal representation for its employees. In addition, employees need not spend significantly more time in connection with damages cases than in the defense of injunctive cases, yet no one has ever suggested that plaintiffs seeking injunctive relief for constitutional violations should have to make extraordinary showing to obtain the discovery necessary to prepare their cases.

Moreover, individuals have a broad range of statutory causes of action against federal officials, including causes of action that turn on questions of motive and intent, such as claims of disparate treatment based on race, sex, national origin, handicap, and so on. Discovery proceeds every day in such cases under the usual standards of the Federal Rules of Civil Procedure. Those cases -- undoubt-

edly far greater in volume than *Bivens* litigation -- have not disabled the government from conducting the people's business. In any event, it would surely stand the Bill of Rights on its head to hold that the vindication of individual rights protected by the First, Fourth and Fifth Amendments holds a disfavored place in the federal courts compared to the vindication of rights created by statute.

It is also important to note that *Bivens* actions can be, and are, brought against low- as well as high-level federal employees. *See, e.g., Siegert v. Gilley*, 111 S. Ct. 1789 (1991) (*Bivens* action against psychologist at government hospital). Indeed, the defendants in the *Bivens* case itself were non-supervisory federal law enforcement agents. *See Bivens*, 403 U.S. at 389. Even if courts should be careful to avoid undue interference with the important public business of high officials, courts need not exempt all 1.7 million federal employees (*see United States v. National Treasury Employees Union*, 63 U.S.L.W. 4133, 4137 n.13 (U.S. Feb. 22, 1995)) from the Federal Rules of Civil Procedure.

A heightened Rule 56(f) standard in *Bivens* cases is as unwarranted when the factual issues involve the defendant's state of mind as when they involve her actions. The rationale used by some courts of appeals for a heightened standard where motive or intent is at issue is that *Harlow* requires some procedural mechanism to weed out cases where the plaintiff has no significant evidence of illegitimate motive or intent and that summary judgment does not accomplish this function because defendants can rarely obtain summary judgment concerning their state of mind.

See, e.g., *Hobson v. Wilson*, 737 F.2d 1, 29 (D.C. Cir. 1984). Unlike this case, however, *Harlow* did not involve interpretation or application of the Federal Rules. Rather, it involved a modification of judicially crafted immunity rules so that those rules did not magnify the very risk of litigation they were designed to avoid. This case, by contrast, is squarely governed by the Federal Rules of Civil Procedure. Difficulties that one class of defendants may have in prevailing under the summary judgment provisions of the Federal Rules do not justify rewriting the Rules for their benefit.

In addition, as explained above, Rule 56(f) as written provides federal courts with all the authority they need to dismiss at an early stage cases where the plaintiff does not have a tangible basis for allegations of unconstitutional motive or intent. To grant summary judgment in the face of a Rule 56(f) affidavit that sets forth specific, nonconclusory grounds for plaintiff's assertion of improper motive would deny a significant number of plaintiffs a fair opportunity to prove their cases. Such a result would effectively put government employees above the law in the wide range of circumstances where the Constitution gives individuals a clearly established right against improperly motivated government conduct. *See* note 6 above; *see also Martin v. D.C. Metropolitan Police Dep't*, 812 F.2d 1425, 1437 (D.C. Cir. 1987) (R.B. Ginsburg, J.) ("Allowing plaintiffs to raise certain claims of unconstitutional motive could become an empty gesture were we to impose a blanket restriction on *all* discovery prior to resolution of the qualified immunity issue on summary judgment.") (emphasis in original), *vacated in part*, 817 F.2d 144 (D.C.

Cir. 1987), *reinstated sub nom. Bartlett v. Bowen*, 824 F.2d 1240 (D.C. Cir. 1987) (*en banc*).

Controls on Discovery. In any kind of case, including *Bivens* cases, where some discovery into critical factual issues is warranted, any discovery burdens that are undue or excessive can be avoided through the district court's broad authority over the scope of discovery. This judicial discretion makes even more inappropriate any heightened Rule 56(f) test in *Bivens* cases. A plaintiff who satisfies Rule 56(f) does not necessarily have the right to conduct unfettered discovery. The Federal Rules give district judges ample authority to protect *Bivens* defendants (like other defendants) with legitimate complaints about the breadth of the discovery sought by the plaintiff.

According to Rule 56(f) itself, when the non-movant presents adequate reasons for her inability to defeat the summary judgment motion without discovery, the court has several options: "the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." Trial judges are in the best position to determine how much discovery is appropriate in light of a plaintiff's specific factual allegations, and they can control discovery by, for example, limiting the number or scope of interrogatories or depositions or the time allowed to complete discovery. As this Court noted in *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 265 (1968), Rule 56(f) "provides for comparatively limited discovery for the purpose of showing facts sufficient to withstand a summary judgment

motion, [compared to] Rule 26, which provides for broad pretrial discovery." *See also Moore's Federal Practice* ¶ 56.24, at 56-808 to -809; *Martin*, 812 F.2d at 1438 (suggesting district court should permit "particularized interrogation" of defendants on one critical meeting).

In exercising their discretion over discovery, district courts should give due weight not only to the legitimate interests of federal officials in avoiding unduly burdensome discovery, but also to the legitimate interests of individuals whose clearly established constitutional rights are at stake. For the past two decades, *Bivens* actions have played a critical role in redressing injuries inflicted by federal government officials acting totally contrary to their clearly established constitutional obligations.

Maintenance of effective *Bivens* remedies also deters lawless overreaching by government officials. No less than victims of private wrongs, victims of governmental wrongs deserve a reasonable opportunity to obtain discovery before adjudication of the merits of their claims. Otherwise, federal officials would be cloaked with an absolute immunity that the Court has already deemed inappropriate. *See Harlow*, 457 U.S. at 808-13. As this Court recognized in *Harlow*, "firm application of the Federal Rules of Civil Procedure" protects against insubstantial lawsuits. *Id.* at 819 n. 35 (citation omitted).

Application of these principles to the facts of this case is straightforward. The district court applied the appropriate legal standard, asking whether petitioner presented allegations of "concrete facts" that are "tangible and

nonconclusory." *Kimberlin v. Quinlan*, 774 F. Supp. 1, 6 (D.D.C. 1991). Petitioner satisfied this standard by presenting factual allegations that met the standard of Rule 56(c), not just Rule 56(f). To the extent that discovery on the *Bivens* claim should be limited to avoid an undue burden on respondents, the district court has ample authority to do so on remand.

CONCLUSION

The judgment of the Court below should be reversed.

Respectfully submitted,

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